CASE NO. 05-35569

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, et al.,

Plaintiff-Appellees,

vs.

NATIONAL MARINE FISHERIES SERVICE, et al

Defendant-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOMEBUILDERS IN SUPPORT OF DEFENDANT-APPELLANT NATIONAL MARINE FISHERIES SERVICE

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* National Association of Homebuilders makes the following disclosure statement:

The National Association of Homebuilders (NAHB) is a national organization that exists to represent the building industry by serving its members and affiliated state and local builders associations. NAHB has approximately 220,000 members encompassing individuals and firms that develop and finance residential, commercial, and industrial projects. NAHB does not have a parent corporation, nor does any publicly held company have a ten percent or greater ownership interest in NAHB.

I. Statement Of Identity Of *Amicus Curiae* National Association Of Homebuilders

The National Association of Homebuilders (NAHB) is a national organization that exists to represent the building industry by serving its members and affiliated state and local builders associations. NAHB has approximately 220,000 members encompassing individuals and firms that develop and finance residential, commercial, and industrial projects. The overwhelming majority of NAHB members are small businesses as defined by the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 801 *et seq.*

II. Statement of Interest of *Amicus Curiae* National Association of Homebuilders in National Wildlife Federation v. National Marine Fisheries Service

Amicus Curiae NAHB is a national organization that represents the building industry. NAHB's builder members will construct approximately 80 percent of the more than 1.84 million new housing units in the United States projected for 2005. NAHB members expend substantial resources to obtain biological opinions and incidental take statements under section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. 1536, and/or incidental take permits under section 10 of the Endangered Species Act, 16 U.S.C. 1539.

Disposition of the issues raised on appeal will have a direct effect on NAHB and its members. If the district court's decision is affirmed on one or more of the stated grounds for the holding, then the consultation process mandated by section 7 of the ESA likely will become more onerous. 16 U.S.C. 1536. NAHB member activities on private, non-federal land are routinely subject to that consultation process where, for example, it is necessary to obtain a permit under section 404 of the Clean Water Act, 33 U.S.C. 1344. In addition, if affirmed, the district court's decision may complicate the incidental take permit process set forth under section 10 of the ESA. 16 U.S.C. 1539. NAHB member activities that involve the incidental take of endangered species are subject to the consultation process, incidental take permit process, or both.

This *Amicus Curiae* brief is limited to a single issue: whether, section section 7(a)(2) of the ESA imposes a duty on federal agencies (here, the U.S. Army Corps of Engineers, Bureau of Reclamation, and Bonneville Power Administration) to insure that their actions do not reduce appreciably the likelihood of the survival of listed species or whether the requirements of section 7(a)(2) also extend an obligation on federal agencies to not impair recovery of listed species.

The district court erred when it held that section 7(a)(2) imposes an independent obligation to consider impacts on recovery. *National*

Wildlife Federation v. National Marine Fisheries Service, No. CV 01-640-RE, Slip Op. at 35 (D. Or. May 26, 2005). This holding is contrary to the plain language and structure of the statute, the Service's regulation implementing the statute, and the Service's consistent interpretation of its regulation.

If this Court affirms the district court decision and holds that the Service must make a jeopardy determination when it concludes that a federal action will reduce appreciably the likelihood of recovery of a listed species but not the likelihood of survival of that species, hundreds if not thousands of private projects previously approved under the ESA will be invalidated. The decision could undermine hundreds of Habitat Conservation Plans ("HCPs") adopted by private landowners and local governments in the last decade to balance economic development with the protection of endangered and threatened species. The Court's decision will impact these HCPs because the approval of an HCP by the Service (or the U.S. Fish and Wildlife Service) is subject to the requirements of section 7(a)(2) and because Congress incorporated the Service's definition of "jeopardy" into the HCP provisions of the ESA. *See* 16 U.S.C. 1539(a)(2)(B)(iv); H.R. Conf. Rep. No. 97-835 at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870. Unless the district court decision is reversed, it is the view of *Amicus Curiae* NAHB that

this litigation could result in serious adverse impacts to the economies of the states within the Court's jurisdiction and beyond.

Amicus Curiae NAHB submits this brief pursuant to Federal Rule of Appellate Procedure 29 and our Motion for Leave to File *Amicus Curiae* Brief, filed simultaneous with this brief.

III. Argument

A. The District Court's Decision is Contrary to the Plain Language and Structure of the Endangered Species Act

Congress enacted the ESA in 1973 as a "means whereby the ecosystems upon which endangered and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered and threatened species." 16 U.S.C. 1531(b). The Act "contains a variety of protections designed to save from extinction species that the Secretary of the Interior designates as endangered or threatened." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690 (1995).

One means of protecting species that is included in the ESA is the consultation requirement set forth in section 7(a)(2), which states, *inter alia*, that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [agency] action ... is not

likely to jeopardize the continued existence of [listed] species..." 16 U.S.C. 1536(a)(2). The district court's holding that this provision requires that "listed species be protected from any appreciable reduction in their likelihood of recovery," Slip Op. at 35, is inconsistent with the plain language and structure of the Act.[1] As the Service's ESA implementing regulations state, a jeopardy determination need only be made when an action reduces the likelihood of both survival and recovery of a listed species. *See* 50 C.F.R. 402.02. In other words, an action jeopardizes a species when it imperils the continued existence of that species, not when it interferes with recovery of that species.

1. The Plain Language of Section 7(a)(2) Makes Clear that a Jeopardy Determination Cannot be Based Solely on a Likelihood that an Action will Reduce the Probability of Recovery of a Species.

As the Supreme Court has repeatedly emphasized, "when the statute's language is plain, the sole function of the courts—at least where

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[1] The jeopardy determination that the Service must make is distinct from the destruction or adverse modification determination that the Service must make under the same provision. As we explain in greater detail below, the Ninth Circuit's decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) does not apply in the context of the jeopardy determination.

the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). Section 7(a)(2) states, in part, that an action agency in consultation with the Service must insure that the action "is not likely to jeopardize the continued existence of any endangered species or threatened species..." 16 U.S.C. 1536(a)(2). The plain language of the quoted portion of section 7(a)(2) makes clear that the duty imposed on the federal agencies is to insure that the action will not threaten the survival of the species.

Where the words in a statute are not specifically defined, they should be given their plain and ordinary meaning. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (stating that "in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used" (quotation marks and citation omitted)). The ordinary meaning of jeopardize is "[t]o expose to loss or injury; imperil." *The American Heritage Dictionary of the English Language* 938 (Joseph P. Pickett ed., 4th ed. 2000). The ordinary meaning of existence is "[t]he fact or state of being; being." *Id.* at 623. Thus, the plain meaning of the term "jeopardize the continued existence" is to "imperil" a species "state of

being." These definitions reinforce the plain language of section 7(a)(2).

Somewhat surprisingly, the district court did not consider the plain language of the ESA when interpreting the Act's requirements respecting jeopardy. *See* Slip Op. at 34-35. Instead, the district court focused on the Service's regulations, which it misinterpreted as explained below. Because the statute's language is plain, this Court's analysis should begin and end there.

2. The Plain Language of Section 7(a)(2) is Consistent with the Structure of the Act

The Supreme Court has stated that "a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Section 7(a)(1) states that "[t]he Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species[.]" 16 U.S.C. 1536(a)(1). Section 7(a)(1) applies to federal programs. Furthermore, section 7(a)(1) includes an affirmative obligation to conserve. *See id.*; *see also Pyramid Lake Paiute Tribe of Indians v. United States Dept. of the Navy*, 898 F.2d

1410, 1416-17 (9th Cir. 1990). In contrast, section 7(a)(2) states that "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any [agency] action ... is not likely to jeopardize the continued existence of [listed] species or result in the destruction or adverse modification of [the critical habitat] of such species." 16 U.S.C. 1536(a)(2). By its own terms, section 7(a)(2) applies to discrete federal agency actions. Furthermore, the focus of section 7(a)(2) is on whether those actions are likely to: (1) jeopardize the continued existence of listed species or (2) result in destruction of adverse modification of critical habitat. *See id.*; *see also Bennett v. Spear*, 520 U.S. 154, 158 (1997).[2]

It is apparent that Congress intended to impose a requirement on federal agencies to carry out programs for conservation in section 7(a)(1) and to insure actions are not likely to jeopardize the continued existence of listed species or result in destruction of adverse modification of critical habitat in section 7(a)(2). When read in light of the definition of

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[2] For analyses of section 7(a)(1) and 7(a)(2), see James C. Kilbourne, *The Endangered Species Act: The Endangered Species Act Under the Microscope: A Closeup Look from a Litigator's Perspective*, 21 Envtl. L. 499, 525-72 (1991); J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 Envtl. L.

conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary," 16 U.S.C. 1532(3), the focus of section 7(a)(1) is plainly on recovery of species. In contrast, section 7(a)(2) has a narrower focus; namely, providing sufficient protection for existing populations of listed species and their designated critical habitats.[3]

The plain language of section 7(a)(2), which is written for the purposes of insuring that agency actions will not jeopardize the continued existence of listed species, is consistent with this structure. Whereas, under section 7(a)(1), federal agencies "have affirmative obligations to conserve," *Pyramid Lake Paiute Tribe of Indians*, 898 F.2d at 1417,

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1107, 1121-25 (1995).

[3] In *Gifford Pinchot Task Force*, 378 F.3d at 1070, this Court held that the phrase "destruction or adverse modification of [critical habitat]" imposes on the Service an independent obligation to consider whether an action diminishes the value of critical habitat for the recovery of a listed species because of the fact that the statutory definition of critical habitat expressly incorporates the notion of conservation. As interpreted by this Court, the conservation mandate does not derive from section 7(a)(2); instead, it derives from sections 3(5) (defining critical habitat) and 3(3) (defining conservation), 16 U.S.C. 1532(3) & (5). For this reason, the structural relationship between section 7(a)(1) and 7(a)(2) is unaffected by *Gifford Pinchot Task Force*.

"[t]he purpose of [section] 7(a)(2) is to ensure that the federal government does not undertake actions, such as building a dam or highway, that incidentally jeopardize the existence of endangered or threatened species," *Carson Truckee Water Cons. Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984).

B. The District Court Misinterpreted the Service Regulations

The district court relied on regulations promulgated by the Service to implement the ESA as the basis for its holding that listed species must be protected "from any appreciable reduction in their likelihood of recovery."[4] Slip Op. at 35. As explained above and in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the regulations are only relevant to the extent that the statutory language is ambiguous.

When a court reviews an agency's construction of the statute

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4 The district court also relied on the Service's Consultation Handbook to support its holding. *See* Slip Op. at 34-35. Such guidance documents are only entitled to deference to the extent they possess the power to persuade. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944), *cited in United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Furthermore, reference to guidance is only necessary where other tools of construction do not suffice. Here, as we have explained, the plain language of the ESA, its structure, and the Service's implementing regulations together provide clear and unassailable indicia of Congressional intent.

> which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 843-44 (1984). Because the language of section 7(a)(2) is unambiguous, there is no need to look to the regulations as a tool of statutory construction. But as explained below, the regulations are consistent with the plain language of section 7(a)(2).

The regulation relied on by the district court defines the phrase "jeopardize the continued existence of" to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild..." 50 C.F.R. 402.02. The plain language of the regulation indicates that an action must reduce the likelihood of both survival and recovery of a species to jeopardize its existence. In other words, an action that reduces the likelihood of recovery of a species but does not reduce the likelihood of survival of that species does not

jeopardize its existence pursuant to the regulation.

This interpretation was advanced by the Service in the district court. *See* Federal Defendants' Reply Memorandum on Cross-Motions for Summary Judgment 11-13 (April 15, 2005). An agency's interpretation of its own regulation is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulations is entitled to deference unless it is "plainly erroneous or inconsistent with the regulation" (citations omitted)). But here the district court only provided the Service "limited deference." Slip Op. at 35. Thus, the primary basis articulated by the district court for its interpretation of section 7(a)(2) was its (mis)interpretation of the Service's regulations.

The second basis articulated by the district court for its interpretation of section 7(a)(2) is this Court's decision in *Gifford Pinchot Task Force*. Below we explain why the district court's reliance is misplaced. But here we note that in *Gifford Pinchot Task Force*, 378 F.3d at 1069, the court interpreted the identical phrase "both the survival and recovery of a listed species" in the plain language manner advocated by the United States and by us and in contradistinction to the approach adopted by the district court. *Accord Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441-42 (5th Cir. 2001).

C. The District Court's Reliance on *Gifford Pinchot Task Force* is Also Misplaced

The district court attempted to extend the holding of the Ninth Circuit in *Gifford Pinchot Task Force* regarding destruction and adverse modification to the instant case regarding jeopardy.[5] *See* Slip Op. at 35. This effort is misplaced.

Section 7(a)(2) focuses on whether federal agency actions are likely to: (1) jeopardize the continued existence of listed species or (2) result in destruction or adverse modification of critical habitat. 16 U.S.C. 1536(a)(2). In *Gifford Pinchot Task Force*, this Court addressed the latter of these two issues. The Court noted that the statutory definition of "critical habitat" includes the concept of conservation. *See* 378 F.3d at 1070 (citing 16 U.S.C. 1532(5)(A)). The Court also took note of the statutory definition of "conservation." *See id.* (citing 16 U.S.C. 1532(3)). In light of these definitions, the Court held that "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." *Id.*

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[5] The discussion of *Gifford Pinchot Task Force* herein should not be

The Ninth Circuit simply did not reach the first issue above, that is, how to interpret the phrase "jeopardize the continued existence of." But as explained above, the plain language of the statute controls. In the alternative, provided this Court draws the conclusion that the plain language is ambiguous, the Service's interpretation is entitled to *Chevron* deference. *See United States v. Mead*, 533 U.S. 218, 226-27 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). That interpretation—embodied in a regulation promulgated pursuant to the Administrative Procedure Act, 5 U.S.C. 501 *et seq.*, after notice and comment—was upheld in the only other decision to reach the issue as of this time. *See Forest Guardians v. Veneman*, Case No. 03-451-TUC-CKJ (D. Ariz. March 31, 2005) (attached as Addendum I).

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construed as an endorsement of that decision.

D. If Affirmed, the District Court's Interpretation of Section 7(a)(2) Could Have Substantial Adverse Impacts on the Development of Habitat Conservation Plans under Section 10

Under section 10 of the ESA, the Service is authorized to issue incidental take permits to non-federal entities. Congress amended the ESA in 1982 to add the incidental take permit process in an effort to address the concerns of private landowners who wish to pursue lawful activities on their private property without risking criminal and civil penalties under section 9 and to authorize the Service to approve HCPs that provide long-term conservation commitments in furtherance of the purposes of the ESA. H.R. Conf. Rep. No. 97-835 at 29-30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870-71. The legislative history of the Act manifests congressional desire to encourage the development of HCPs to address the conservation of species, both listed and unlisted.

> To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sectors and among government agencies in the interest of species and habitat conservation.... This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and habitat conservation.

H.R. Conf. Rep. No. 97-835 at 30-31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2871-72.

The critical role of non-federal entities including private landowners in achieving the purposes of the ESA cannot be overstated. HCPs provide a means to involve non-federal entities in the conservation of species and the ecosystems on which they depend. As Michael Bean, Chair of the Wildlife Program for Environmental Defense observed:

> The 1982 amendments [authorizing issuance of incidental take permits] gave the [Service] more than just a practical means of influencing private land use. They also gave the agency a means of persuading private landowners to do many of the very things that the taking prohibition alone has been powerless to compel. That is, the habitat conservation plans (HCPs) that the [Service] must approve before it may issue a permit allowing incidental taking of listed species can be the vehicles for restoring former habitat, protecting existing but unoccupied habitat, reconnecting fragmented habitats, ensuring active management to replicate the effects of prior natural disturbances, controlling non-native species, and doing a host of other essential things that the taking prohibition has never been able to compel. [W]ithout such measures, the Act's goal of recovery for many species is likely to remain beyond our reach forever. Simply prohibiting taking doesn't get you there.

Michael J. Bean, *The Endangered Species Act and Private Land: Four Lessons Learned From the Past Quarter Century*, 28 Envtl. L. Rep. (Envtl. L. Inst.) 10701, 10708-09 (Dec. 1998).

Since the enactment of section 10 in 1982, the Service has approved over 500 HCPs. *See* U.S. Fish and Wildlife Service, Conservation Plans and Agreements Database, *at*

http://ecos.fws.gov/conserv_plans/public.jsp (visited June 30, 2005). The HCPs range in geographic scope from less than one acre to over 10 million acres. *See id.* And the number of species conserved range from one to more than 100. *See id.* These figures demonstrate the real world benefits that HCPs are providing to species and the ecosystems on which they depend.

In order to obtain an incidental take permit, applicants must submit an HCP containing certain information specified in section 10(a)(2)(A). 16 U.S.C. 1539(a)(2)(A). In addition, the Service must make certain findings including a finding that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *See id.* § 1539(a)(2)(B)(iv). This language is patterned on the definition of the phrase "jeopardize the continued existence of" contained in the Service's ESA implementing regulations. *See* 50 C.F.R. 402.02. The legislative history of the 1982 amendments to the Act explain that "[t]he Secretary will base his determination as to whether or not to grant the permit, in part, by using the same standard as found in section 7(a)(2) of the Act as defined by Interior Department regulations, that is, whether the taking will appreciably reduce the likelihood of the survival and recovery of the species in the wild." H.R. Conf. Rep. No. 97-835 at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870.

The district court's decision, which includes a novel interpretation of the Service's regulations, 50 C.F.R. 402.02, will have dramatic implications for HCPs if the decision is applied to the approval of HCPs. If affirmed, the district court's decision interpreting those regulations is likely to influence future analyses of HCPs because the approval of an HCP is an "agency action" subject to section 7(a)(2) and because the section 10 permit standards incorporate the "jeopardy" standard of section 7(a)(2). 16 U.S.C. 1539(a)(1)(B). The result will be a chilling effect on the development and implementation of HCPs and, in turn, a reduction in protection of endangered species on non-federal land. As many academic studies have documented, encouraging landowners to engage in voluntary HCPs is essential to achieve the goals of the ESA on private land. *See* National Center for Environmental Decision-Making Research, *Understanding and Improving Habitat Conservation Plans: Analysis, Capacity Building, and Process Improvement* 2 (Dec. 4, 1998), *available at* http://www.ncedr.org/pdf/hcp.pdf (visited June 30, 2005) (stating that "HCPs are politically inevitable and necessary if endangered species and biodiversity interests are to be integrated with economic development and into landscape level community planning"). *Cf.* National Academy of Sciences, *Science and the Endangered Species Act* 61-62 (1995) (noting that endangered species are found across the United

States and slightly more than 59 percent of the land in the United States is privately owned and a program that only targets federal land will not prevent species extinction).

Dr. David Wilcove of Princeton University acknowledged the importance of HCPs in protecting endangered species on private land.

> The ESA relies on fines and jail sentences to deter or punish undesirable behavior, but it provides no rewards or incentives to encourage good behavior on the part of landowners. . . . [I]t does little to encourage landowners to restore or enhance the habitats of endangered species on their property. This is deeply important issue for three reasons. First, habitat destruction and degradation are by far the leading threats to biodiversity . . . . Second, most of the habitat for our endangered species occur on private land. . . . Finally, a significant fraction of our endangered species is threatened by problems such as invasive, exotic species and fire suppression. Such species eventually will vanish regardless of whether their habitats are protected, unless those habitats are properly managed on their behalf. In short, until landowners become more willing participants in the national effort to save endangered species, there is little reason to hope that most species will recover and every reason to believe that many species will vanish. This, I submit, is the greatest challenge facing the Endangered Species Act.

David S. Wilcove, *The Promise and the Disappointment of the Endangered Species Act,* 6 N.Y.U. Envtl. L.J. 275, 277-78 (1998).

Other nationally recognized members of the conservation biology community concur.

> [T]he bigger problem is that referred to above: the ESA, and environmental policies generally, have not encouraged proactive actions that might preclude the need to list species as endangered or threatened.... People are beginning to realize that conflicts can be avoided, or at least reduced, by fulfilling the needs of many species at once through the broad-scale conservation of habitats, and that such actions may keep some species off the endangered species list, thus reducing the regulatory burden for private landowners.

Reed F. Noss, et al., *The Science of Conservation Planning: Habitat Conservation under the Endangered Species Act* 2 (1997). These nationally recognized scientists understand that only through appropriate incentives will private landowners be willing to commit the substantial land and financial resources that are necessary to develop and implement HCPs on private property. HCPs are the primary mechanism under the ESA for protecting endangered species habitat on private land. The district court's decision threatens the viability of hundreds of HCPs across the nation through the court's radical new interpretation of the requirements of section 7(a)(2).

IV. Conclusion

Amicus Curiae NAHB respectfully requests that the Court issue a decision reversing and vacating the district court decision and consistent with the views set forth herein.

Respectfully submitted,

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Paul Weiland LS

Paul S. Weiland

Attorneys for the National Association of Homebuilders

ADDENDUM I

TO

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOMEBUILDERS IN SUPPORT OF DEFENDANT-APPELLANT NATIONAL MARINE FISHERIES SERVICE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Forest Guardians,

Plaintiff,

vs.

Ann M. Veneman, et al.,

Defendant.

No. CV 03-451-TUC-CKJ

ORDER

Pending before the Court are Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. For the reasons stated below, Plaintiff's motion is denied and Defendants' motion is granted.

I. Background

A. Threshold Issue Regarding the Definition of "Jeopardy"

On November 15, 2004, the Court sent out an Order discussing some procedural issues that have arisen in this case, and the Order also sought briefing from the parties in relation to the definition of "jeopardy." The Order stated in relevant part:

> In a recent ruling in *New Mexico Cattle Growers Assoc., et. al. v. U.S. Fish and Wildlife Service, et. al.* (CIV. 02-199 JB/LCS), Judge Browning of the United States District Court for the District of New Mexico vacated the critical habitat of the spikedace and loach minnow. In light of this ruling, the parties filed a stipulation with the Court in October of 2004 agreeing that "Forest Guardians claims involving the standard used to determine adverse modification of critical habitat, and the validity of that determination in this case are moot." However, the parties further stipulated that the remaining claims in this case can proceed to a decision before this Court.

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The remaining claims in this case are related to the Fish & Wildlife Service's ("FWS") finding that there would be no jeopardy to the spikedace and loach minnow as a result of allowing grazing to continue on the allotments at issue in this case. As the parties concede that this issue is still properly before the Court, an issue has arisen which the parties have not had an opportunity to address, and which needs to be addressed before the Court will issue a decision in this case. After Plaintiff's Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment were fully briefed, a decision from the Ninth Circuit was issued which invalidated the FWS's regulation defining critical habitat. The parties both notified the Court of this decision, which is *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004).

*

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In relation to a jeopardy determination, "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, **directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species** . . ." 50 C.F.R. § 402.02 (emphasis added). In relation to damage to critical habitat, "'Destruction or adverse modification' means a **direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species**." *Id.* (emphasis added).

In ruling that the destruction or adverse modification of critical habitat regulation was invalid, the Ninth Circuit reasoned:

> This regulatory definition explicitly requires appreciable diminishment of the critical habitat necessary for survival before the 'destruction or adverse modification' standard could ever be met. Because it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species survival, the regulations singular focus become 'survival' . . . the regulatory definition reads the 'recovery' goal out of the adverse modification inquiry; a proposed action 'adversely modifies' critical habitat if, and only if, the value of the critical habitat for *survival* is appreciably diminished . . . The FWS could authorize the complete elimination of critical habitat necessary only for recovery, and so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished, then no 'destruction or adverse modification,' as defined by the regulation, has taken place. This cannot be right. If the FWS follows its own regulation, then it is obligated to be indifferent to, if not to ignore the recovery goal of critical habitat . . . The agency's controlling regulation of critical habitat thus offends the ESA because the ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted.

Gifford Pinchot Task Force, 378 F.3d at 1069-1070. The Ninth Circuit went on to cite various statutory provisions supporting its conclusion that Congress intended the ESA to foster conservation and the recovery of listed species. *See id.* at 1070-1071; *see also* 16 U.S.C. §1531(b) ("The purposes of [the ESA] are to provide a means whereby the ecosystems upon which endangered and listed species depend may be conserved, to provide a program for the conservation of such endangered and threatened species . . .); 15 U.S.C. §1536(a)(1)("The Secretary shall review other programs administered by him and utilize such programs in furtherance of [the ESA]. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered and threatened species . . ."); 16 U.S.C. 1532(3) (defining

conservation as the "use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.").

As noted above, the regulatory definitions relating to "destruction or adverse modification of critical habitat" and "jeopardize the continued existence" of listed species are worded in essentially the same manner. Both refer to an action appreciably reducing both the survival and recovery of the listed species. As the "jeopardize the continued existence of" definition is worded in the conjunctive like the definition of "destruction or adverse modification of critical habitat," it seems that the interpretation in *Gifford Pinchot Task Force* compels the conclusion that the regulatory definition for jeopardy reads out the "recovery" aspect in a jeopardy analysis, with the sole focus on survival. In other words, it is possible that an action could harm a listed species' prospects for recovery, without necessarily threatening its bare survival. However, the opposite is not true; an action that harms a listed species' prospects for survival would reduce its ability to recover. As such, in light of *Gifford Pinchot Task Force*, the Court has concerns about the regulatory definition of "jeopardize the continued existence of." The Court is aware that the Fifth Circuit in *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), found the "destruction or adverse modification of critical habitat" definition to be invalid like the court in *Gifford Pinchot Task Force*, but specifically ruled that definition of "jeopardize the continued existence of" was still valid. *See id.* at 441-443 and 443 n.61. However, the court in *Gifford Pinchot Task Force* never directly addressed or specifically ruled that the definition of "jeopardize the continued existence of" was still valid. As the parties have not had an opportunity to address these issues, the Court is ordering additional briefing as to how the Ninth Circuit would treat the "jeopardize the continued existence of" definition in light of the decision in *Gifford Pinchot Task Force*.

On December 15, 2004, the parties (including amici curiae) filed their briefs discussing this issue. After reviewing these briefs, the Court finds that *Gifford Pinchot Task Force* does not compel the Court to find that the definition of "jeopardy" is invalid. As Defendants correctly point out, the Ninth Circuit did not address whether the agencies' interpretation of the ESA was permissible, and it did not mention recovery in upholding FWS's no jeopardy determinations. Further, in relation to the definition of "destruction or adverse modification," the Ninth Circuit's holding focuses primarily on two definitions in the ESA tied to critical habitat, but which are not specifically tied to jeopardy. First, the Ninth Circuit noted that the ESA defines the term "**conservation**" as "all methods that can be employed to 'bring any endangered species to the point at which the measures provided pursuant to the [ESA] are no longer necessary." *Id.* at 1070 (quoting 16 U.S.C. §1532(3)). Thus, pursuant to this definition, "conserving" the species is equivalent to "recovering" the species. The Ninth Circuit then pointed out that the ESA defines "critical habitat" in terms

of the geographical areas "essential for **conservation**" of a species": "the specific areas . . . occupied by the species . . . which are . . . essential to the **conservation** of the species' and the specific areas outside the geographical area occupied by the species . . . that . . . are essential for the **conservation** of the species." (quoting 16 U.S.C. §1532(5)(A) (emphasis added)). Thus, as Defendants correctly point out, in contrast to "jeopardy," the *Gifford Pinchot Task Force* decision is grounded on the fact that the "adverse modification" in relation to critical habitat is itself specifically defined in terms of recovery. In light of these distinctions, the Court finds that the logic in *Gifford Pinchot Task Force* does not compel the conclusion that the definition of jeopardy is invalid. Further, a review of the briefs and the relevant case law shows that there are no controlling cases on point which have invalidated the long-standing definition of jeopardy. Accordingly, the Court finds that the FWS's definition of jeopardy is still valid.

B. Legal and Regulatory Background on the ESA

As the parties have already stipulated that the adverse modification of critical habitat issue is moot, the Court need only address the FWS's no jeopardy determination in this case.

Generally, Section 7 of the Endangered Species Act ("ESA") requires each federal agency to ensure that any action authorized, funded, or carried out by that agency "is not likely to jeopardize the continued existence of any endangered species . . ." 16 U.S.C. § 1536(a)(2). In order to achieve this objective, the agency proposing the action must consult, as relevant to this litigation, with the FWS whenever its action "may affect" a threatened or endangered species. 50 C.F.R.. § 402.14(a). If the agency determines that its action will have no affect on an endangered or threatened species, it need not engage in "formal consultation," and the FWS need not concur in this determination. *See Southwest Center for Biol. Div. v. United States Forest Service,* 100 F.3d 1443, 1447-48 (9th Cir. 1996); *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995). However, formal consultation resulting in a biological opinion, as in this case, occurs if the action may affect a listed species. In making such a determination, the agency

"shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). In relation to a jeopardy determination, "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . ." 50 C.F.R. § 402.02. As noted above, the jeopardy definition is worded in the conjunctive, referring to an action appreciably reducing both the survival and recovery of the listed species. In other words, it is possible that an action could harm a listed species' prospects for recovery, without necessarily threatening its bare survival. However, the opposite is not true; an action that harms a listed species' prospects for survival would reduce its ability to recover. As Defendants point out in their reply brief, pursuant to FWS regulations, a jeopardy determination is warranted only if there is harm to both survival and recovery. *See* Defendants' Reply Brief at 11, n.12 (FWS explained that the word "both" was added to emphasize that, except in certain exceptional circumstances, injury to recovery alone would not warrant the issuance of a 'jeopardy' biological opinion. 51 Fed. Reg. at 19,934. In fact, FWS rejected a commentator's suggestion that injury to recovery for an already depleted species would require the issuance of a jeopardy opinion, explaining that the "continued existence of the species is the key to the jeopardy standard, placing an emphasis on injury to a species' 'survival.'" *Id.*) Accordingly, as this regulation is still valid, as long as the continued grazing at issue does not appreciably reduce **both** the survival and recovery of the species, the FWS's no jeopardy determination must be upheld under the applicable deferential standard of review. *See Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1097 (9th Cir. 2003)([T]he Service is entitled to substantial deference to its interpretation of its own regulations . . . Indeed, judicial review of an agency's interpretation of its own regulations is limited to ensuring that the agency's interpretation is not plainly erroneous or inconsistent with the regulation.).

II. Factual Background

This case stems from the United States Fish & Wildlife Service's ("FWS") biological opinion ("BO") addressing the effects of authorization or re-authorization of livestock grazing on sixteen allotments of land on the Apache-Sitgreaves National Forest ("Forest") located in Apache and Greenlee Counties, Arizona. Specifically, Plaintiff challenges the BO as arbitrary and capricious based on the FWS's no jeopardy finding as to the spikedace and loach minnow.

The loach minnow and spikedace are small fish that have experienced serious population crashes due to various historic practices, including grazing. *See* BO at 125-128. The spikedace and loach minnow now only inhabit 10-20% of their historic range. *See* BO at 125-128. They currently occupy parts of the Blue and San Francisco Rivers in the Apache-Sitgreaves National Forest. There is no dispute, as recognized throughout the BO, that historically, the effects of grazing have had direct adverse effects on the loach minnow and spikedace through serious degradation of the Blue and San Francisco rivers. *See* AR at 97-99, 126-129. As such, the FWS listed the spikedace and loach minnow as threatened in 1986, and has recognized since 1994 that their declining populations warrant listing as endangered. Removal of vegetative cover, increased erosion, increased runoff, erosion and sedimentation of the rivers, and alteration of the hydrologic regime are among the adverse effects grazing has had on the habitat of the spikedace and loach minnow. Further, it is also undisputed, as recognized by the FWS throughout the BO, that the historic effects of grazing and continued grazing activities would continue to adversely affect the loach minnow and spikedace. *See* AR at 97-99, 126-129.

The Forest Service recognized, for example, that "the existing conditions of the aquatic and riparian habitat within the [Turkey Creek] allotment are highly degraded from past and ongoing management activities, and provide little or no buffering or filtering capability before entering critical habitat . . ." *See* BO at 67. The FWS also recognized that in regards to this allotment, "range, soil, and riparian conditions are severely deteriorated, and

that components of the proposed action, such as utilization levels and/or herd size, exceed those that would promote sustainable and healthy rangelands given current range conditions. Because of the degraded range conditions and proposed utilization levels, the FWS believes that degradation of the various watersheds, and ultimately Campbell Blue Creek, the Blue River, and the San Francisco River, will continue." *See* BO at 105.

Throughout the BO, the FWS recognizes that the grazing allotments in question are in poor condition and that continuing grazing would contribute to the deterioration of the watershed. The FWS recognized "that some of the impacts to the watersheds in which the proposed action would be occurring have been caused by past grazing, private lands use, agriculture, roads, or other human activities." *See* BO at 101. However, the FWS still noted that "livestock grazing on the 16 allotments included within the proposed action area has contributed, and continues to contribute, to the overall degradation of the allotments and the Blue and San Francisco rivers, as well as other named and unnamed perennial and intermittent drainages, and to sub-optimum watershed conditions and functions within and downstream of the Allotments." *See* BO at 102.

Ultimately, despite the historic effects of grazing and the continuing effects of grazing, the FWS concluded that the proposed action would not jeopardize the continued existence of the spikedace and loach minnow.

As to the spikedace, the FWS concluded:

> After reviewing the current status of the spikedace, the environmental baseline for the action area, the effects of the proposed reauthorization of livestock grazing on 16 allotments of the Alpine and Clifton Ranger districts of the Apache National Forest, and the cumulative effects, it is our biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of, or destroy or adversely modify designated critical habitat for, the spikedace within complex 6. **The changes made by the Forest Service to reduce the number of cattle and season of use on the Allotments on the Alpine Ranger District, combined with removal of cattle from the mainstem Blue and San Francisco rivers, has, in our opinion, removed the threat of jeopardy and adverse modification from the proposed action.** In the Final Rule designating critical habitat for spikedace and loach minnow . . . we noted that "Because of these species' precarious status, mere stabilization of spikedace and loach minnow at their present levels will not achieve conservation. Recovery through protection and enhancement of the existing

populations, plus reestablishment of populations in suitable areas of historical range, are necessary for their survival." We conclude that while there is no jeopardy or adverse modification, the proposed action will adversely affect the survival and recovery of spikedace for the following reasons:

*Spikedace are limited in distribution to 289 miles of stream in portions of the Gila River, lower San Pedro River, Aravaipa Creek, and Eagle Creek. They are likely still present, but appear to be in declining numbers, in the Verde River. Its present range is 10 to 15 percent of its historic range, and is now only common in Aravaipa Creek and portions of the upper Gila River. Because of this limited range and distribution, habitat along the Blue and San Francisco rivers is essential to the survival, and particularly the recovery, of this species.

*The proposed action covers 279,681 acres which are in degraded riparian, range, soil conditions. The FWS recognizes that, in part, these conditions are due to past actions. Conditions can be summarized as follows [a summary chart appears on page 126 of the BO].

The proposed actions would continue grazing when the environmental baseline is degraded, and we believe continued grazing of this area will perpetuate current conditions or preclude or delay recovery. We are specifically concerned that utilization rates remain higher than suitable on areas that are already degraded. **However, we believe the recent reductions in cattle numbers and seasons of use, combined with removal of the cattle from the mainstem Blue and San Francisco rivers, will prevent the proposed action from jeopardizing the continued existence of the fish, and will not result in adverse modification of habitat. We anticipate that some degradation will continue, as the on-going degradation in this area will take some time to slow, halt, and reverse to improvement of conditions.**

See BO at 125-128.

As to the loach minnow, the FWS came to essentially the same conclusion:

For the reasons noted above under spikedace, we believe an analysis of the effects of the proposed action on Complex 6, in which the proposed action occurs is appropriate. After reviewing the current status of the loach minnow, the environmental baseline for the action area, the effects of the proposed reauthorization of livestock grazing on 16 allotments of the Alpine and Clifton Ranger districts of the Apache National Forest, and the cumulative effects, it is our biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of, or destroy or adversely modify designated critical habitat for, the spikedace within complex 6. As noted above under spikedace, in the Final Rule designating critical habitat for spikedace and loach minnow . . . we noted that "Because of these species' precarious status, mere stabilization of spikedace and loach minnow at their present levels will not achieve conservation. Recovery through protection and enhancement and enhancement of the existing populations, plus reestablishment of populations in suitable areas of historical range, are necessary for their survival." We believe the action as proposed action will adversely affect the survival and recovery of spikedace for the following reasons:

*Loach Minnow are limited in distribution to 419 miles of stream. Where they were commonly found throughout much of the Gila River Basin, Salt, San Pedro, and San Francisco subbasins, it is now commonly found only in Aravaipa Creek, the Blue River, and limited portions of the San Francisco, upper Gila, and Tularosa Rivers in New Mexico. It has been reduced in distribution to 15 to 20 percent of its historical range. Because of this limited range and distribution, habitat along the Blue and San Francisco rivers is essential to the survival, and particularly the recovery, of this species.

*The proposed action covers 279,681 acres which are in degraded riparian range, soil conditions. The FWS recognizes that, in part, these conditions are due to past actions. Conditions are summarized under conclusions for spikedace above, in Table 11.

The proposed actions would continue grazing when the environmental baseline is degraded, and we believe continued grazing of this area will perpetuate current conditions or preclude or delay recovery. We are specifically concerned that utilization rates remain higher than suitable on areas that are already degraded. **However, we believe the recent reductions in cattle numbers and seasons of use, combined with removal of the cattle from the mainstem Blue and San Francisco rivers, will prevent the proposed action from jeopardizing the continued existence of the fish, and will not result in adverse modification of habitat. We anticipate that some degradation will continue, as the on-going degradation in this area will take some time to slow, halt, and reverse to improvement of conditions.**

The conclusions of this biological opinion are based on full implementation of the project as described in the Description of the Proposed Action section of this document, including any conservation that were incorporated into the project design.

See BO at 127-128.

There is support in the administrative record for the FWS's determination that reducing the number of cattle and season of use and removal of cattle from the Blue and San Francisco rivers are effective mitigation measures. As the pertinent agencies recognized, one of the most effective methods for eliminating the effects of grazing on aquatic habitat is to keep livestock out of riparian areas, which the Forest has done along the critical habitat on the Blue and San Francisco Rivers. The FWS recognized that the "Forest Service will continue their commitment to exclude the Blue and San Francisco mainstem riparian corridors from all cattle grazing. This will be important in repairing stream conditions within the Apache National Forest for spikedace and loach minnow." *See* AR at 100. The other mitigation measures FWS relied on in reaching its no jeopardy decision were measures in

place to exclude livestock from other areas of critical habitat, loach minnow habitat, and riparian areas of tributaries. *See* AR at 13, 16, 18, 19, 22.

Other mitigation measures were controlling livestock numbers, forage use levels, and the time and season to protect against the effects of grazing, which would improve the habitat for the loach minnow and spikedace. *See* AR at 97, 99. The Forest has reduced the number of livestock grazing on the allotments which decreases utilization, trampling, and destruction of vegetation, which decreases erosion and stability of the watershed. The FWS determined that this resulted in a positive trend in soil cover and stabilization that would continue with the proposed action. *See* AR 97, 99. Seasonal grazing restrictions are also in place on certain allotments, and continuous grazing has been eliminated on others allowing for the growth of more plants. The FWS found that these measures can mitigate the effects of continued grazing. *See* AR 112, 114-115. The FWS also relied on studies indicating that the various mitigation measures at issue can promote the recovery of the habitat for the loach minnow and spikedace.

III. Discussion

Under the Administrative Procedures Act ("APA"), "a court may set aside an agency action if the court determines that action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078 (9th Cir. 2001). Thus, this Court may **not** "substitute its judgment for that of the agency" yet is to consider whether the agency's "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In addition, where an agency's decision involves the agency's scientific and technical expertise, this Court must be "at its most deferential" and defer to the agency's decision if the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Nat'l Res. Defense Council, Inc.*, 462 U.S. 87, 103, 105 (1983). Ultimately, "the agency must

justify its final action by reference to the reasons it considered at the time it acted." *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 560 (9th Cir. 2000) citing *Camp v. Pitts,* 411 U.S. 138, 142-43 (1973). However, "[a]n agency is not required . . . to furnish detailed reasons for its decision." *Lodi Truck Services, Inc. v. United States,* 706 F.2d 898, 901 (9th Cir. 1983). So long as the agency's decision is sufficiently clear such that the court did not speculate as to the bases for the agency's decision, the Court may uphold the decision. *See id.*

In spite of the high degree of deference the Court must give to the FWS's no jeopardy determination, Plaintiff argues the no jeopardy decision must be overturned for several main reasons as discussed below.

Plaintiff argues that the BO is contradictory and not supported by the record, and therefore is arbitrary and capricious. Plaintiff points to many references throughout the BO whereby the FWS recognizes that grazing has had direct adverse affects to the spikedace and loach minnow. Plaintiff also emphasizes that the BO also reflects that continued grazing on the 16 allotments in question will continue to have adverse affects on the spikedace and loach minnow. Indeed, Plaintiff points out that the FWS concluded that the "proposed action will adversely affect the survival and recovery" of the spikedace and loach minnow. *See BO* at 125-128. In light of the numerous explicit findings throughout the BO documenting the historic and continuing adverse affects to the spikedace and loach minnow, Plaintiff argues that FWS's no jeopardy determination directly contradicts the findings of the BO and is not supported by the record.

In response, Defendants argue that the FWS's finding of adverse affects to the survival and recovery of the species is not in conflict with the FWS's ultimate conclusion that there is no jeopardy to the species. As discussed earlier, Section 7 of the ESA requires each federal agency to ensure that any action authorized, funded, or carried out by that agency "is not likely to jeopardize the continued existence of any endangered species . . ." 16 U.S.C. § 1536(a)(2). In order to achieve this objective, the agency proposing the action must consult

with the FWS whenever its action "may affect" a threatened or endangered species. 50 C.F.R. § 402.14(a). If the agency determines that its action will have "no affect" on an endangered or threatened species, it need not engage in "formal consultation," and the FWS need not concur in this determination. *See Southwest Center for Biol. Div. v. United States Forest Service,* 100 F.3d 1443, 1447-48 (9th Cir. 1996); *Pacific Rivers Council v. Thomas,* 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994), *cert. denied,* 514 U.S. 1082 (1995).

In light of these regulations, Defendants emphasize that as a threshold matter, a finding of adverse affects to a species is required to even trigger formal consultation. As such, Defendants argue that the fact that the FWS found that there were adverse affects to the survival and recovery of the spikedace and loach minnow does not compel a jeopardy determination. In relation to a jeopardy determination, Defendants argue that as long as the proposed action was "not likely to jeopardize the continued existence of any endangered species," the FWS's no jeopardy conclusion was permissible. 16 U.S.C. §1536(a)(2). Indeed, "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to **reduce appreciably** the likelihood of both the survival and recovery of a listed species . . ." 50 C.F.R. § 402.02 (emphasis added). Although Plaintiff cites dictionary definitions of "appreciably" to mean capable of being perceived or recognized, the Defendants point out that FWS has interpreted similar terms differently. The FWS has not specifically interpreted the term "reduce appreciably," but it has interpreted the term "appreciably diminish the value of" in relation to destruction or adverse modification to mean "to **considerably** reduce the capability of designated critical habitat to both the survival and recovery of a listed species." *See* FWS and NMFS, "ESA Section 7 Consultation Handbook," March 1998 at 4-34 (emphasis added). The FWS has also explained in its consultation handbook that "[a]dverse effects on individuals of a species . . . do not result in jeopardy . . . unless that loss, when added to the environmental baseline, is likely to result in **significant** adverse effects throughout the species' range." As an agency's interpretation of it regulations is entitled to a substantial degree of deference, the

Court finds that the interpretation of the regulations advanced by Defendants is more persuasive than Plaintiff's. *See Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1097(9th Cir. 2003)([T]he Service is entitled to substantial deference to its interpretation of its own regulations . . . Indeed, judicial review of an agency's interpretation of its own regulations is limited to ensuring that the agency's interpretation is not plainly erroneous or inconsistent with the regulation.). Accordingly, the Court finds that the FWS's conclusion that "we believe the recent reductions in cattle numbers and seasons of use, combined with removal of the cattle from the mainstem Blue and San Francisco rivers, will prevent the proposed action from jeopardizing the continued existence of the fish . . ." is not contradictory to the FWS's earlier conclusions regarding the adverse affects on the survival and recovery of the species. *See* BO at 125-128.

Defendants also argue that contrary to Plaintiff's assertions, the record supports FWS's conclusion that the recent reductions in cattle numbers and seasons of use, combined with removal of the cattle from the mainstem Blue and San Francisco rivers, will prevent the proposed action from jeopardizing the continued existence of the fish. The Court agrees. As already discussed above, Defendants have highlighted various portions of the record which support the FWS's conclusion. The FWS recognized that one of the most effective methods for eliminating the effects of grazing on aquatic habitat is to keep livestock out of riparian areas, which the Forest has done along the critical habitat along the Blue and San Francisco Rivers. The FWS also relied on measures in place to exclude livestock from other areas of critical habitat, loach minnow habitat, and riparian areas of tributaries. Other mitigation measures in the record were controlling livestock numbers, forage use levels, and the time and season of grazing to protect against the effects of grazing, which would improve the habitat for the loach minnow and spikedace. The Forest has reduced the number of livestock grazing on the allotments which decreases utilization, trampling, and destruction of vegetation, thereby reducing erosion and stability of the watershed. The FWS determined that this resulted in a positive trend in soil cover and stabilization that would continue with

the proposed action. Seasonal grazing restrictions are also in place on certain allotments, and continuous grazing has been eliminated on others allowing for the growth of more plants. The FWS found that these measures can mitigate the effects of continued grazing. Accordingly, the Court finds that in reaching its decision, the FWS considered the relevant factors and articulated a rational connection between the facts and its decision to make a no jeopardy determination. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416; *Baltimore Gas & Elec. Co.*, 462 U.S. at 103, 105; *Marsh v. Oregon Nat'l Resources Council*, 490 U.S. at 378.

Plaintiff also argues that as a matter of law, a no jeopardy finding under the ESA must be reasonably certain to occur. To support this proposition, Plaintiff relies on three district court cases. *See American Rivers v. U.S. Army Corps of Engineers*, 271 F.Supp.2d 230, 252 (D.D.C. 2003); *Center for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1152 (D. Ariz. 2002); *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 268 F.Supp.2d 1255, 1273 (D. Or. 2003). Plaintiff argues that throughout the BO, it is established that there is only the potential to address the threats to the species, and that the adverse effects will continue indefinitely. For example, Plaintiff points out a portion of the BO which states that "[i]t is the combination of these diminished environmental baseline conditions and the higher utilization rates that leads us to conclude that continued grazing will result in the further degradation of riparian and river conditions, and reduced condition of some constituent elements." *See* AR at 100. Another portion of the BO states that "some degradation will continue, as the ongoing degradation in this area will take some time to slow, halt, and reverse to improvement of conditions." *See* BO at 128. As such, Plaintiff argues that the no jeopardy finding is contrary to law as it is not reasonably certain.

In response, Defendant argues that Plaintiff's contention that a no jeopardy finding must have a "reasonable certainty of occurring" is not supported by the statute, regulations, or controlling authority. The Court agrees. First, the controlling statute only requires that the proposed action "is **not likely** to jeopardize the continued existence" of an endangered

species. 16 U.S.C. §1536(a)(2) (emphasis added). Further, the current regulation interpreting the statute states that "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . ." 50 C.F.R. § 402.02. Defendant argues that in the preamble to the current regulations, the agencies rejected changing the word "would" to "could," explaining that such a change would be an "unwarranted deviation" from the "not likely to jeopardize" language in 16 U.S.C. §1536(a)(2). *See* 51 Fed. Reg. 19,926, 19,935 (June 3, 1986). Thus, the statute and the regulation and its history support the proposition that "not likely" was intended to give the agencies the ability to weigh the probability of a proposed action resulting in jeopardy.

Defendant also cites Ninth Circuit authority which supports this position; the Ninth Circuit has held that "[w]hen an agency relies on the analysis and opinion of experts and employs the best evidence available, the fact that the evidence is 'weak,' and thus not dispositive, does not render the agency's determination 'arbitrary and capricious.'" *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-1337 (9th Cir. 1992)(upholding a no jeopardy decision "[d]espite the uncertainty of the data" because the agency based its decision on the best available scientific data and considered the relevant factors). Defendant also correctly points out that the three district court cases relied on by Plaintiff are not controlling authority. In addition, Defendant argues that these cases are distinguishable as those courts addressed the degree of certainty that mitigation measures would be implemented before they could be considered in a no jeopardy determination, as opposed to the degree of certainty necessary to determine if a proposed action will jeopardize the continued existence of a species. *See* Defendants' Reply Brief at 4-5; *American Rivers*, 271 F. Supp.2d 230, 252-253; *Center for Biological Diversity*, 198 F.Supp.2d 1139, 1153; *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 268 F.Supp.2d 1255, 1273. Here, as Defendants emphasize, the mitigation measures in question will be implemented as the reduction in number of livestock and prohibition on grazing were

in place during consultation, were enforceable as part of the grazing permits, and the BO also requires the Forest to reinitiate consultation for the FWS to reevaluate its no jeopardy determination if other mitigation measures are not followed.

Lastly, Defendants argue that Plaintiff's contention that the BO shows that the mitigation measures only had the potential to avoid jeopardy is incorrect. Further, Defendant argues the fact that some adverse affects will continue under the action does not compel a jeopardy determination. Although the BO does in fact recognize the historic and continuing adverse affects of grazing, the FWS ultimately determined based on its scientific expertise that because of the mitigation measures in question, the proposed action was not likely to jeopardize the spikedace and loach minnow: "However, we believe the recent reductions in cattle numbers and seasons of use, combined with removal of the cattle from the mainstem Blue and San Francisco rivers, **will prevent** the proposed action from jeopardizing the continued existence of the fish, and will not result in adverse modification of habitat. We anticipate that some degradation will continue, as the on-going degradation in this area will take some time to slow, halt, and reverse to improvement of conditions." *See* BO at 127. Further, as already discussed above, there is support in the record for this determination which supports the FWS's finding of no jeopardy from the proposed action.

Accordingly, based on the foregoing, the Court finds that the FWS's no jeopardy determination must be upheld because it is based upon a consideration of the relevant factors and that there has been no clear error of judgment. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416. Based upon the best scientific evidence in the administrative record and the FWS's explanations for the no jeopardy determination, the Court finds that the FWS considered the relevant factors based upon the scientific data before it, and articulated a rational connection between the facts and its decision to make a no jeopardy determination. *See, e.g., Baltimore Gas & Elec. Co.*, 462 U.S. at 103, 105. *See also Marsh v. Oregon Nat'l Resources Council*, 490 U.S. 360, 378 (1989) ("...[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court

might find contrary views more persuasive."). Thus, under the deferential standard of review applicable to this case, the Court finds that the FWS's no jeopardy determination relating to the spikedace and loach minnow was in compliance with the ESA and the APA.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED as follows:

(1) Plaintiff's Motion for Summary Judgment is **denied** and Defendant's Cross-Motion for Summary Judgment is **granted.**

(2) This case is **dismissed with prejudice.**

(3) The **Clerk of the Court shall close the file in this matter.**

DATED this 31st day of March, 2005.

Cindy K. Jorgenson
United States District Judge

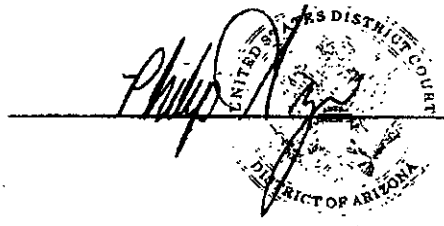
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ELECTRONIC CERTIFICATION

I hereby attest and certify on March 31, 2005
that the foregoing document is a full, true and correct copy of the original
on file in my office and in my custody.

CLERK, U. S. DISTRICT COURT
DISTRICT OF ARIZONA

By  Deputy Clerk

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Verification Code__XTDLSYvahvf

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FOREST GUARDIANS,

vs.

ANN M. VENEMAN, ET AL.,

JUDGMENT IN A CIVIL CASE

Case NO-CV-03-451-TUC-CKJ

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiff's Motion for Summary Judgment is **DENIED** and Defendant's Cross-Motion for Summary Judgment is **GRANTED**. This case is **DISMISSED WITH PREJUDICE** and Judgment is entered. The Clerk of the Court shall **CLOSE** the file in this matter.

March 31, 2005
Date

RICHARD H. WEARE
CLERK

(By) Deputy Clerk, M. Gorski

CC: OB, CKJ, CNSL

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PROOF OF SERVICE (FEDERAL)

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and am not a party to the within action; my business address is Nossaman, Guthner, Knox & Elliott, LLP, 50 California Street, 34th Floor, San Francisco, California 941111.

On **July 1, 2005**, at my employer's above-stated place of business, I served the foregoing document(s) described as BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOMEBUILDERS IN SUPPORT OF DEFENDANT-APPELLANT NATIONAL MARINE FISHERIES SERVICE on interested parties in this action by placing ( ) the original (X) a true copy thereof enclosed in a sealed separate envelope to each addressee as follows:

SEE ATTACHED SERVICE LIST

(x) **(By U.S. Mail)** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit. I deposited such envelope(s) with postage thereon fully prepaid in a collection box from where it would be placed in the United States Mail at Irvine, California that same day in my employer's ordinary course of business.

( ) **(By Personal Service)** I caused to be delivered by hand true and correct copies thereof on the interested parties in this action by having the messenger service personally deliver same in a sealed envelope to the office of the addressee(s) as above indicated.

( ) **(By Facsimile)** I served a true and correct copy by facsimile pursuant to C.C.P 1013(e), to the number(s) listed above or on attached sheet. Said transmission was reported complete and without error.

( ) **(By Federal Express)** I served a true and correct copy by Federal Express or other overnight delivery service, for delivery on the next business day. A true and correct copy of the Federal Express or other overnight delivery service airbill is attached hereto.

(x) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **July 1, 2005**, at Irvine, California.

Lisa Stanford

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